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Supreme Court, U.S.
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No. 93-1410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

UNIVERSITY OF COLORADO, BOULDER,
through its Board,
THE REGENTS OF THE UNIVERSITY OF COLORADO,
a body corporate;
JUDITH ALBINO, as President of
the University of Colorado, Boulder; and
WILLIAM MAROLT, as Athletic Director,
Department of Intercollegiate Athletics,

Petitioners,

v.

DAVID DERDEYN, individually and on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF COLORADO

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not dispute the most significant points the University raises in its petition. Although Respondents disparage the importance of the University's interest in preventing drug abuse by student athletes, they effectively concede the importance of the University's interest in protecting "the health and safety of student athletes."[1] Opp. 19. Respondents also acknowledge that federal appeals courts have ruled that athletes, including high school athletes, may be subject to random drug testing without violating their Fourth Amendment rights. Opp. 14. And while they do not dispute that this Court in *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989), and *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), upheld drug testing programs more intrusive than the University's programs here, respondents make no effort at all to explain how the governmental interests in these cases could be greater than those in this case or how the privacy interests here could be more substantial.

Beyond this, respondents do not deny that the ACLU has brought lawsuits across the nation challenging similar drug testing programs at other schools. Nor do they deny that the underlying federal constitutional issues are certain to recur with

[1] Respondents' repeated mention of "student trainers, managers, and cheerleaders" as members of the plaintiff class on nearly every page of their brief obscures the fact that this case primarily concerns student athletes. The student trainers, managers, and cheerleaders who are members of the class (none of whom testified at trial) comprise only a handful of students, and their numbers are insignificant compared to the number of athletes subject to the University's program. Nonetheless, the University's concerns about preventing illicit drug use are equally applicable to this small group. Cheerleaders executing a drill requiring balance or split-second timing are as susceptible to injury as any other athlete if drug-impaired. They also serve as role models for other students, and their violation of drug rules can be expected to have a demoralizing effect on the University's athletic program. All of these individuals are intimately associated with the team, and there is no constitutionally significant distinction between them and student athletes.

frequency, draining the scarce resources of schools that become targets of ACLU-fostered litigation.

As respondents remind this Court, all of the University's random testing programs have been nullified. The University is not even allowed to adopt a program based on the full, informed, and written consent of participants. This creates a significant crisis for University officials and others responsible for the safety and welfare of student athletes and for the integrity of athletic programs across Colorado. As the University's athletic director William Marolt testified, the social, academic, and athletic pressures on 17 to 22-year-old college athletes create a strong need for a reason to say "no," which the University's drug testing program previously gave them (Tr. 187).

That every version of the University's program has been nullified by the court below leaves the University with no effective alternative to cope with the drug problem. And it sends a chilling message to any school that might consider adopting such a program in the future: in Colorado, there is no way to protect students, so there is no point in even trying.

The Colorado Supreme Court's decision has tremendous practical importance to thousands of college and high school students in Colorado, and to the parents who rely on school administrators to protect the safety and welfare of their children. Given the vigorous dissenting opinions of the two justices below, this is plainly a case that merits further review.

I. THERE IS NO SIGNIFICANT FACTUAL DISPUTE.

Respondents argue that this case presents merely a "factual dispute." In reality, there is no significant dispute about the facts at all. The opposition acknowledges that the University's programs "called for urine testing," that the "[t]ests were designed to be truly random," and that students signed "a University form purporting to give 'consent' to testing." Opp. 2. They also admit that students received consent forms at "team meetings," and discussed them with coaches and trainers. Opp. 6. Although they

claim that some students were "surprised" by the form (*ibid.*), they do not claim that *anyone* failed to understand the information given, or that pressure was placed on anyone, apart from denial of participation in sports and financial aid that was contingent on an athletic scholarship. There is no dispute, moreover, that the NCAA requires "participants in post-season competition to submit to random urine testing," confirming the University's assertion that drug testing is an established part of the athletic training regimen in this country. Opp. 6. Respondents also agree with our assertion that "[s]tudent athletes surely may be subject to some University regulation." Opp. 17.

Significantly, there is no claim in the brief in opposition that the drug problem at the University of Colorado is different from that at any other campus where thousands of students attend college; and there is no denial of the University's showing that steroids and stimulants are physically harmful to student athletes and unfairly influence athletic competition, or that athletes are more inclined than other students to use them.

There is thus no dispute about the relevant facts here, only about their legal significance. The undisputed core of facts squarely raises the legal question presented in the petition, a recurring question of great public importance. This Court may take the facts as presented in the opinions of the courts below and render its decision on the constitutional issues without regard for irrelevant "factual complications" suggested by respondents. Opp. 12.

II. THE DECISION BELOW CONFLICTS WITH RULINGS IN OTHER JURISDICTIONS.

Respondents try to deny that there is any conflict among appellate courts on the precise issue presented by distinguishing high school and professional athletes from college athletes. But the state's interest in protecting the health and safety of college athletes is surely the same as its interest in protecting high school athletes, as is its interest in preserving the integrity of athletic

competition at all levels, amateur and professional.[2] If anything, the state's interest is greater in college than in high school; on a college campus there are no parents present to supervise students or to protect them from the temptation of drug abuse.

Every other court applying a balancing test that weighs the government's interest in safe and fair competition against the privacy expectations of athletes has ruled in favor of the state. *See Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1988) (high school athletes); *DiMeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (professional athletes); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1987) (same); *O'Halloran v. University of Washington*, 679 F. Supp. 997 (W.D. Wash. 1988), *rev'd on procedural grounds*, 856 F.2d 1375 (9th Cir. 1988) (college athletes); *Acton v. Vernonia School Dist. 47J*, 796 F. Supp. 1354 (D. Or. 1992) (high school athletes); *see also Hill v. National Collegiate Athletic Ass'n*, 7 Cal.4th 1, 865 P.2d 633, 26 Cal. Rptr.2d 834 (1994) (college athletes). Far from showing that the Colorado Supreme Court's decision is consistent with other appellate decisions, respondents have only emphasized its singularity.

Respondents' citation (Opp. 15) to the district court decision in *Brooks v. East Chambers Consol. Indep. School Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd without op.*, 930 F.2d 915 (5th Cir. 1991), only highlights the conflict in authority. The program invalidated in *Brooks* was much broader than the University's program here, and the relationship between drug use

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[2] Respondents try to distinguish *DiMeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991) (en banc), as a case "where there were more demonstrable safety interests and where legalized gambling heightened integrity concerns relating to the public fisc." Opp. 14. The same interests exist here, for example, with regard to football. Athletic Director Marholt testified that football players are peculiarly susceptible to injuries due to the nature of the sport (Tr. 177-78). He also testified that football provides the revenue that supports other University programs (Tr. 192-93). Public perception that football games were "rigged" would drastically diminish this revenue. There is no significant difference between the athletes in *DiMeo* and football players here.

and non-athletic extracurricular activities, as well as the school district's justifications for its program, were vague. In *Brooks*, Judge Gibson held that a random drug testing program may be reasonable if "prompted by circumstances other than ordinary," 730 F. Supp. at 764, and then explicated the circumstances that would justify such a program, all of which are present here:

> A special interest required to justify the urinalysis program could exist . . . if it were shown that participants in extracurricular activities are much more likely to use drugs than non-participants, or that drug use by participants interfered with the school's educational mission much more seriously than does drug use by non-participants.

Ibid. Neither interest was shown in *Brooks*, and the court found that the program, applicable to *all* students who participated in extracurricular activities, was unconstitutional. 730 F. Supp. at 765-66.[3]

Here, by contrast, the undisputed evidence was that, as to steroids and other performance-enhancing drugs, use by athletes is far more prevalent than by non-athletes (Tr. 658-60). The University clearly has a greater interest in detecting and deterring drug use among intercollegiate athletes than among the general student population. The reduced privacy expectations of the locker room and training environment are also "extraordinary" and unique to the student athlete group.

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[3] The court expressly distinguished the drug testing program for high school athletes upheld in *Schaill v. Tippecanoe County School Corp.*, 864 F.2d 1309 (7th Cir. 1989), on the ground that "the evidence before the *Tippecanoe* district court was significantly different than the evidence at bar, with the program approved by the Seventh Circuit considerably more limited than the one before this Court." *Brooks*, 730 F. Supp. at 766. Likewise, the University's programs here were more limited than that in *Brooks*.

III. THE COLORADO SUPREME COURT MISAPPLIED THE DECISIONS OF THIS COURT.

Respondents assert rhetorically that the Colorado Supreme Court applied *Skinner* and *Von Raab* "meticulously" in this case.[4] Ironically, they make no attempt to demonstrate that the rulings in those cases were correctly applied here. To the contrary, respondents do not even acknowledge that in both *Skinner* and *Von Raab* this Court upheld drug testing programs because the governmental interests outweighed any privacy interest. Nor do respondents address the numerous parallels between those cases and this case.

According to respondents, *Skinner* and *Von Raab* merely announce generalities concerning the applicability of the Fourth Amendment to drug testing programs and the need to "weigh" privacy interests against governmental interests. Respondents proceed to trivialize the University's interests in safe and fair competition while exalting the privacy interests of athletes who routinely undress, shower, and urinate together. The result reached below conflicts in principle with this Court's reasoning in *Skinner* and *Von Raab*; the opinions of the dissenting justices below show that the legal standards set forth in these cases need to be reaffirmed in the context of college athletics. Although respondents pretend that no useful articulation of the law could be made in this case beyond the analysis laid out in *Skinner* and *Von Raab* (Opp. 13), the context of athletic competition is extremely important in its own right. In the precise context here,

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[4] Respondents concede that there are no adequate and independent state grounds for the Colorado Supreme Court's decision under *Michigan v. Long*, 463 U.S. 1032 (1983). Opp. 15 n.8. Their suggestion that "a subsequent resolution of this case on state constitutional grounds is surely more than a remote possibility" is sheer speculation, and erroneously implies that the court below would disregard this Court's Fourth Amendment decisions after having previously followed them under state constitutional standards. *See, e.g., Orr v. People*, 803 P.2d 509 (Colo. 1990); *People v. Rister*, 803 P.2d 483 (Colo. 1990). In any event, this is plainly an insufficient reason to deny certiorari. *See Colorado v. Bertine*, 479 U.S. 367, 370 (1987).

the authorities are in conflict, and the people of Colorado are entitled to guidance on how the Fourth Amendment applies to it.

Respondents make only a conclusory attempt to show that student athletes have substantial privacy interests. Their position amounts to an overly fastidious objection to urinating "in a locker room or in a bathroom behind a coach's administrative office in front of their peers," Opp. 17, a procedure that one member of the women's basketball team said was "no big deal" (Tr. 496). Respondents make no effort to deal with the case law holding that urination on athletic teams occurs in a common lavatory setting, *see DiMeo*, 943 F.2d at 682, and that all athletes anticipate that the team environment will involve substantial intrusions on their privacy. *See Schaill,* 864 F.2d at 1319; *O'Halloran,* 679 F. Supp. at 1004-05; *Hill,* 865 P.2d at 658. Their position boils down to the unilateral assertion that "We don't like it" (Tr. 126), or, as one student put it, "I felt it was a bummer" (Tr. 65). The question under the Fourth Amendment, however, is whether society deems their privacy expectations to be reasonable in the specific context of a college athletic program.

On the other hand, respondents trivialize the University's interests in protecting the health and safety of its student athletes, in promoting fair competition, and in deterring drug use, the primary reasons for the program (Tr. 165). Obviously, the health and safety of young people, with whose care and protection the University is charged, is an enormously important interest; it is irresponsible for respondents to suggest otherwise. To argue that there is no *governmental* interest in ensuring fair competition (Opp. 19), where the government itself promotes and sponsors that competition, is absurd. If school athletic administrators have no interest in promoting fair competition, then it is hard to understand why they exist at all. And, the Colorado Supreme Court's rejection of the "role model" rationale for athletic drug testing merely highlights the conflict in appellate authority. *See Schaill,* 864 F.2d at 1320-21.

Respondents assert that the absence of a demonstrable drug problem weighs against the University's interests. Opp. 20.[5] But it is irresponsible to suggest that this in any way lessens the University's interests, or that health and safety concerns are *de minimis* until a more serious problem arises. Even the court below conceded that *preventing* drug use by students is a significant public safety interest. *University of Colorado v. Derdeyn,* 863 P.2d 929, 945 n.30 (Colo. 1993) (Pet. App. 33a); *see Von Raab,* 489 U.S. at 674.

IV. CONSENT TO DRUG TESTING WAS VALIDLY OBTAINED.

Respondents cite no evidence of overbearing conduct or pressure by the University in obtaining written consent to drug testing; there is no suggestion that college students did not understand the simple English disclosures. Respondents' argument boils down to the position that consent was coerced because financial aid and athletic participation were adversely affected.[6] But this only brings them back to the "unconstitutional conditions" doctrine on which the trial court relied (Pet. App. 101a-102a), which they do not even try to defend.

There is no basis for the conclusory assertion that the consents here were not "knowingly and intelligently" given, or that there

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[5] Although respondents make much of evidence that after the second year of testing, "the positive results all but disappeared," Opp. 19 n.10, this evidence establishes only that the program was an effective deterrent. Respondents also argue that "anecdotal evidence of highly publicized incidents" involving the deaths of famous athletes cannot justify the University's program. Opp. 20 n.11. But as Athletic Director Marolt testified, the impetus for the stricter program implemented in 1986 came directly from the drug-related deaths of Len Bias and Don Rogers, and from University Police reports that athletes had circumvented the prior, more lenient program (Tr. 179-80). These incidents reflected not "remotely possible harm," but a strong and ever-present danger.

[6] In fact, David Derdeyn testified that he had to agree to participate in the University's drug testing program regardless of whether he received financial aid (Tr. 42).

was any "untoward coercion" merely because athletic participation or financial aid is affected. *See University of Colorado v. Derdeyn,* 863 P.2d at 952 (Pet. App. 46a) (Rovira, C.J., dissenting). That respondents would make this argument without any supporting evidence confirms the purely *legal* error in the decision below. Athletes were given written disclosure statements in advance and were not forced to sign immediately, they had an opportunity to discuss the subject and the option of withdrawing from sports or from the University, they were of sufficient age to understand their decision and were under no custodial pressure whatever. If this was not knowing and voluntary consent, then it is difficult to comprehend what is.

Once again, the issue is not a narrow one; to the contrary, it has great practical importance for schools across Colorado. If the consents obtained here do not pass constitutional muster, then no school can develop a drug testing program based on the consent of its participants.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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